



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Otengo v Sana Industries Co. Ltd (Employment and Labour Relations Petition E035 of 2023) [2023] KEELRC 3046 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3046 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E035 OF 2023
AN MWAURE, J
NOVEMBER 24, 2023

BETWEEN

SAMUEL AMATESHI OTENGO PETITIONER

AND

SANA INDUSTRIES CO. LTD RESPONDENT

JUDGMENT

1. The Petitioner filed a petition dated 28th February 2023.
2. The prayers therein are as hereunder: -
 - a. a declaration be issued that the Petitioner's enjoyment of his rights and fundamental freedoms secured in the bill of rights under articles 19, 20, 21, 22, 23, 24, 25 (c), 27, 28, 29(d), 35, 41, 47 and 50 of the *constitution* of Kenya, 2010 have been threatened and infringed by the Respondent by the dismissal from the employment on account of health status as conducted by the Respondent was without regard to due process of law, was unlawful, illegal, null and void.
 - b. A declaration that the Respondent violated the Petitioner's fundamental rights of freedom from discrimination and human dignity under article 27 and 28 by wrongfully and unjustifiably dismissing him from service on account of his health status.
 - c. An order that Petitioner be paid his terminal benefits and compensation for unfair termination and loss of employment as set in paragraph 26 of the petition herein totalling to Kshs. 681,499.97.
 - d. The court do find that the Petitioner is entitled to and award both general and exemplary damages for violation of his constitutional rights as enumerated above.
 - e. The Respondent be directed to bear costs of this petition.



- f. Interest on c, d and f above.

Petitioner's Case

3. The petition is based upon the Petitioner's supporting affidavit and exhibits thereto filed together with the petition dated 20th February 2023.
4. The Petitioner avers that vide an oral contract on 1st August 2008, the Respondent offered the Petitioner employment as a general worker at a monthly salary of Kshs 13,000 exclusive house allowance which was later confirmed on 1st September 2013 and his salary was gradually raised to Kshs 26,000.
5. The Petitioner avers that he worked diligently until 25th March 2022 when he fell ill and was granted off days to seek treatment.
6. The Petitioner avers that he was admitted at Kenyatta University Teaching, Referral & Research Hospital (KUTRRH) for a month and resumed duty on 11th May 2022 when he was asked by the personnel manager Agnes Kagwiria to go home and return on 7th June 2022 which he did but was once again asked to go home and return on 10th August 2022.
7. That on 10th August 2022, the Petitioner went to St John Hospital where he was given a letter terming him clinically stable to resume duty, however, the Respondent's personnel manager informed him there was no work for him as he was a sick person.
8. The Petitioner avers that the Respondent terminated his services on account of being diagnosed with HIV and was judged and condemned on account of his health status and the Respondent denied him a chance to defend his case and no credible allegation was levelled against him before the dismissal.
9. The Petitioner avers that he never proceeded for leave during his employment and was not paid in lieu of leave days; he was not paid his salary from 25th March 2022-10th August 2022 when he was dismissed; the Respondent never housed him or provided housing allowance during his employment and he worked during public holidays without additional compensation.
10. The Petitioner avers the Respondent's actions towards him are contrary to the basic principles of natural justice and a violation of Section 41 and 46(g) of the *Employment Act*, 2007.
11. That Petitioner avers that the Respondent's direct discrimination at the work place after realizing his HIV status and conduct in the process leading to his dismissal contravened articles 19(2), 25(c), 27(1)(2)(5), 31, 35,41, 47 and 50 of the *Constitution* of Kenya.
12. The Petitioner avers that he has made attempts to register his concerns with the Respondent but the Respondent has declined to hear him.

Respondent's Case

13. In opposition to the petition, the Respondent filed its response 23rd May 2023.
14. The Respondent avers the Petitioner's salary was inclusive of his house allowance a fact that was well within the Petitioner's knowledge during his employment.
15. The Respondent aver that the Petitioner requested an indefinite sick leave on 25th March 2022 which was granted, but upon recovery the Petitioner never resumed duty and never communicated his progress and has continued to be absent from date.



16. The Respondent denies terminating the Petitioner's employment on account of his HIV diagnosis and avers it does not require HIV/AIDS screening to recruit and/or retain its employees and as such was in no position to find the Petitioner's HIV/AIDS status. Further, the Petitioner did not disclose his ailment when requesting for the sick leave.
17. The Respondent denies terminating the Petitioner from employment and instead reiterates that it is the Petitioner who failed to resume back to work upon recovery after being granted sick leave and has continued to absent himself unlawfully and his whereabouts remained unknown to the Respondent until service of the Petition.
18. The Respondent avers that during the Petitioner's employment he proceeded on leave as provided by law or was paid in lieu and further, the Respondent does not operate during public holidays and thus the Petitioner's claim that he worked during public holidays is unfounded.
19. The Respondent denies being issued with a demand notice and notice to sue by the petitioner.
20. The Respondent states that it neither turned away the Petitioner nor did it request the Petitioner to produce medical reports as the Petitioner did not communicate his recovery or whereabouts after being granted sick leave.
21. The Respondent avers that the Petitioner's claim for unpaid salary is unmerited as he did not report to work for 4 months after recovery without permission from the Respondent or any lawful cause.

Petitioner's Submissions

22. It was submitted for the Petitioner that a replying affidavit is the principal document wherein a respondent's reply to a petition is set and its absence as in this case grants the written submissions no effect as seen in *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR.
23. The Petitioner submitted that this petition in addition to the wrongful dismissal and unfair termination, it is also in respect to violation of constitutional rights and the declarations and award for general and exemplary damages sought therein cannot be granted by the lower court adjudicating on an ordinary statement of claim under the donated jurisdiction.
24. The Petitioner submitted that upon resuming duty he presented his discharge notes from Kenyatta University Teaching, Referral & Research Hospital (KUTRRH) to the Human Resource (HR) Manager, Agnes Kagweria showing that he was discharged on 10/05/2022 and stated:

Diagnosis: Tuberculosis of other Organs(a18), Tb Adentis
Human Immunodeficiency(hiv) Disease Complicating Pr (o98.7)
25. The Petitioner further submitted that upon receipt of the discharge notes the Respondent's HR Manager asked the Petitioner to go home and report back on 7th June 2022 and again asked to go home till 10th August 2022 when he was informed he was a sick person and his services were no longer required.
26. It was submitted for the Petitioner that he was dismissed verbally and no letter was given to him outlining the reasons for dismissal and desertion was pleaded by the Respondent solely as an afterthought defence to this petition.



27. The Petitioner submitted that the Respondent failed to put forward any evidence in court to show that it complied with section 41 of the *Employment Act* before termination of the Petitioner, and relied on *Boniface Francis Mwangi v B.O.M. Iyego Secondary School* [2019] eKLR:-

“I am fortified in this by the decision in the case of *Simon Mbithi Mbane v Inter Security Services Limited* [2018] eKLR where Abuodha J. stated that “an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. Similarly, Nduma J. in the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR stated that “dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties”

.....

The employer is however required to abide by the procedural requirements of the law set out under Section 40 and 41(2) of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to present a defence.”

28. It was submitted that the Petitioner was terminated without being afforded a valid reason or hearing which is a classic example of discrimination where an employer fires an employee solely because of their health status and that it is evident that the Petitioner’s only wrong was presenting the discharge summary notes showing his HIV status to his employer upon resuming work.

Respondent’s Submissions

29. The Respondent submitted that it responded to the petition using a ‘Response to Petition’ as it is a recognised pleading under Rule 15 (2) (b) of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which states:-

“After filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.”

30. It is the Respondent’s submission that the absence of a replying affidavit does not invoke the disregard of other documents filed in response to the petition as they are recognised to support the Respondent’s case and relied on the supreme court case of *Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others* [2014] eKLR.
31. The Respondent submitted the instant suit is premised as a claim for unfair termination which can be determined outside of a constitutional petition as the Petitioner failed to demonstrate the correlation between his employment, HIV/AIDS status and how he was discriminated upon. The question before this court is whether there was termination of the Petitioner’s employment and ought it not have been settled at the Magistrate’s court.
32. It was submitted for the Respondent that under Section 5(7) of the *Employment Act* it bears the onus of proof that discrimination did not take place as alleged and in view of this it is submitted that the Respondent does not require HIV/AIDS screening for purpose of recruiting its employees and was in no such position to find out the Petitioner’s HIV/AIDS status.



33. The Respondent further submitted it was unaware of the Petitioner's health status as the Petitioner never resumed duty after being granted sick leave and neither did he furnish the Respondent with discharge notes as the Petitioner did not adduce any evidence on record to support he either entered the Respondent's business premises on the alleged days or that he presented the discharge notes to the Respondent. The Respondent submitted it defeats logic that the Petitioner reported to the HR Manager after legitimately being granted sick leave without mention of being summoned to the said offices.
34. The Respondent submitted that the Petitioner failed to report back to work upon recovery and has continued to absent himself from work with no lawful cause and without leave thus his prayer for one month's salary in lieu of notice and compensation for unfair termination lacks merit.
35. The Respondent further submitted the Petitioner is not entitled to unpaid wages as the Respondent paid all sums owing to the Petitioner as a cumulative monthly wage in march, April, May, June, July and August and in the absence of any evidence the Petitioner is not entitled to this relief.

Analysis and Determination.

36. The issues for determination are:
 - a. Whether the Respondent's 'Response to Petition' deems this petition unopposed
 - b. Whether this court has jurisdiction to determine this petition
 - c. Whether the Petitioner was discriminated by the Respondent on the basis of his health status and was wrongfully and/or unfairly terminated from his employment
 - d. Whether the Petitioner is entitled to the prayers sought

Whether The Respondent's 'response To Petition' Deems This Petition Unopposed

37. Rule 15 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 states:-

“Reply to a petition.

15.

- (1) The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.
- (2)
 - (a) A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a—
 - (i) replying affidavit; or
 - (ii) statement setting out the grounds relied upon to oppose the petition.



- (b) After filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.”

38. In respect to the effect of the Respondent’s failure to file a replying affidavit in opposition to the petition, this court relies on the decision [Car Importers Association of Kenya v County Government of Mombasa](#) [2021] eKLR thus:-

“It is the Petitioner’s case and rightfully so in this Court’s view, that the Grounds of Opposition that were filed by the Respondent are deemed to address issues of law; the said grounds of opposition are general averments and cannot amount to a proper or valid denial of allegations made on oath. See *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR where Odero J, addressing a claim where the Attorney General as the Respondent failed to file a Replying Affidavit stated:

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition, which were filed, are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates v Unesco Co. Ltd* 2015 eKLR, *Prof Olaka Onyango & 10 Others v Hon. Attorney General* constitution Petition No. 8 of 2014 and *Eliud Nyauma Omwoyo & 2 Others –v Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner’s sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”

Similarly, in *Phillip Tirop Kitur v Attorney General* [2018] eKLR, the Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the Petitioner’s evidence stood unchallenged. In addition, the High Court rejected the Attorney General’s contention that the delay in filing the Petition had caused it prejudice, ruling that in the absence of a Replying Affidavit or oral evidence, the Court had no facts upon which it could make such a finding. Therefore, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted.”

39. In [Daniel Kibet Mutai & 9 Others v Attorney General](#) [2019] eKLR the court held:-

- “(31) As the hearing of the petition did not proceed by way of oral evidence, but through affidavit evidence and submissions, this Court is in the same position as the High Court, to the extent that just like the High Court it did not have the advantage of seeing and assessing the demeanour of the witnesses. That leaves us with the obligation of reconsidering the affidavit evidence, the rival submissions made by the parties, and the law, in order to draw our own conclusions. At the outset we find it common ground that although the respondent was served with affidavits sworn by each appellant in support of the petition, the respondent did not file any affidavit in reply, but only filed



grounds of opposition to the petition. A pertinent legal issue therefore arises as to what is the effect of the respondent's failure to file a replying affidavit? This is a question that has previously been addressed by the High Court severally. Two examples will suffice.

- (32) In *Phillip Tirop Kitur v Attorney General* [2018] eKLR, Mativo J dealt with a similar situation in which the petitioner a former university student sued for violation of his fundamental rights and swore an affidavit in support of his petition, averring that he was arrested, subjected to torture, inhuman and degrading treatment, charged, convicted for sedition, and sentenced to a term of imprisonment without proper due process being followed. In response to the petition as in the present appeal, the Attorney -General only filed grounds of opposition, but did not file any replying affidavit or call any oral evidence. The High Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the petitioner's evidence stood unchallenged. The High Court awarded the petitioner Kshs 6,000,000. In addition, the High Court rejected the Attorney General's contention that the delay in filing the petition, had caused it prejudice, ruling that in the absence of a replying affidavit or oral evidence, the court had no facts upon which it could make such a finding.
- (33) The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”
- (34) The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted.”

40. In view of the foregoing, this court holds that a replying affidavit is an essential pleading wherein a respondent's reply to a petition is set and its absence renders the court no facts to make its finding and what is averred in the petitioner's supporting affidavit is herein assumed to be admitted.

Whether This Court Has Jurisdiction To Determine This Petition

41. The Respondent challenged the Petitioner's decision to file this petition in this court before the question of his unfair termination is settled by the magistrate court. This court differs with the Respondent's argument and holds that the petition is properly lodged before this court on grounds that the Petitioner's termination was premised on his health status as averred herein by the Petitioner and therefore hinges on discrimination based on health status.
42. Article 23 and 162 (2) of the *Constitution* grants this court the authority to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights relating to employment and labour relations.
43. Clearly this court has jurisdiction to hear and determine this case.



Whether The Petitioner Was Discriminated By The Respondent On The Basis Of His Health Status And Was Wrongfully And/or Unfairly Terminated From His Employment

44. In *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment), the court stated the following with regards to discrimination and the burden of proof: -

“(42) Discrimination against any employee is specifically provided for under article 27 of the *Constitution* as well as section 5 read together with section 47 of the *Employment Act*. Article 27 of the *Constitution* at clause 4 and 5 provides that:

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) (Emphasis).”

(43) Therefore, no person should directly or indirectly discriminate against another person on any of the grounds specified or contemplated in clause (4) more particularly on account of health status or disability. Section 5 of the *Employment Act* (cap 226) provides that:

“(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —

a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.”

(44) The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Sub-section 7 thus provides:

“(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

(45) Section 47 (5) of the *Employment Act* further requires that:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred



shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

(46) This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.

(47) This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

“[49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”

45. In the instant suit, the Petitioner averred that he was orally terminated from his employment by the Respondent. However, as discussed above the Respondent’s failure to file a replying affidavit in opposition to the petition or even filing an affidavit in support of its ‘response’ failed to controvert the



Petitioner's affidavit and this court therefore holds the Petitioner's case unopposed and admitted by the Respondent.

46. Further to be above, the Respondent did not file any affidavit in evidence in support of its case to dispel the Petitioner's claim that he was discriminated upon and unfairly termination on grounds of his HIV/AIDS. It avers that the Petitioner absconded duty but it failed to provide any evidence to show it reached out to the Petitioner to establish his whereabouts and undertake proper disciplinary procedure as set out under Section 41 of the Employment Act.
47. The respondent did not also give evidence to support that the petitioner deserted employment as claimed by the respondent in their response. It is trite law that it is not sufficient for an employer to merely claim that an employee has deserted duty. He must show efforts made to reach out to the employee and the employee must be informed that the employer is considering terminating him from such employment on the grounds of the said desertion. There is no evidence that the respondent followed the procedure set out clearly in numerous case laws.
48. In the case of No 243 of 2017 Boniface Nkubi Karagnia v Protective Custody Limited the court held that:-

“... whereas desertion is a sufficient ground for dismissal or sufficient to demonstrate there was no unfair dismissal the respondent failed to produce any evidence that the claimant deserted duty.... Desertion necessarily entails the employees intention no longer to return to work. the employer would have to establish this intention in a fair process..

Also in the case of Boniface Francis Mwangi v B.O.M Iyego secondary School 2019 eKLR where court cited with approval Simon Mbithi v inter security services 2018 eKLR the court held that dismissal on account of absconding must be preceded by evidence showing that reasonable attempts was made by the employer concerned and that a show cause letter was issued to such an employee calling upon such an employee to show why his services should not be terminated on account of absconding duties.

49. In view of the foregoing, the court find and holds the petitioner's employment was terminated unfairly and un procedurally on the basis of his health status and so judgment is entered in his favour.
50. The court finds the petitioner is deserving of the following remedies:-
- i. One-month salary in lieu of notice Kshs 26,000/-
 - ii. Balance salary of days worked in March 2022 Kshs 9,999/-.
 - iii. Unpaid salary also for April, May, June and July 4 months Kshs 104,000/-
 - iv. Unpaid salary for 10 days in August 2022- 9,999/99.
 - v. The unpaid house allowance is not proved and as petitioner never asked for it all the time in employment the same is not justified and is denied.
 - vi. Prayer for public holidays is not proved and is denied.
 - vii. The compensation for unlawful termination and damages is pegged at equivalent of 6 months' salary and so settles at inclusive damages for termination on basis of ill health Kshs 156,000
- Total award Kshs 305,999/98
51. Costs are awarded to the claimant and interest at court rates from date of judgment till full payment.



52. Certificate of service to be issued within 30 days hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

